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# In the Supreme Court of the United States

Term, 1971

No. 71-61

NATHAN WECHSLER,
*Petitioner*

vs.

IRVING GOTTLIEB et al.,
*Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PACE REICH,
JERRY ZASLOW,
*Counsel for Petitioner.*

1500 Land Title Building
Broad and Chestnut Streets
Philadelphia, Pa. 19110

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840
Joseph F. Heffernan, Philadelphia Representative, MU 6-5692

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IN THE
SUPREME COURT OF THE UNITED STATES

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**Term, 1971**
**No.**

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NATHAN WECHSLER,

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vs.

IRVING GOTTLIEB et al.,

*Respondents*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

---

The petitioner, Nathan Wechsler, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 15, 1971.

## OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Orders of the District Court for the Eastern District of Pennsylvania dated August 2, 1966 and March 24, 1967 also appear in the Appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 15, 1971 A timely petition for rehearing en banc was denied on April 15, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

## QUESTION PRESENTED

Where an action is brought against a corporation and individuals under the Federal Securities Law alleging fraud arising out of a merger agreement between two corporations in which there is an exchange of stock and other securities, and there is a dismissal as to the corporate defendant by reason of improper service, must not such action be also dismissed as against an individual defendant by reason of the corporate defendant being an indispensable party to the remaining action against such individual defendant?

## STATUTORY PROVISIONS INVOLVED

*United States Code*, Title 28:

Rule 19. *Joinder of persons needed for just adjudication*

(a) *Persons To Be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder Not Feasible.* If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the ac-

tion should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions.* This rule is subject to the provisions of Rule 23, as amended February 28, 1966, eff. July 1, 1966.

## STATEMENT OF THE CASE

A dispute arose between two corporations: World Wide Bowling Corporation, a Delaware Corporation (hereafter World Wide), one of the respondents herein, and Sandia American Corporation, a New Mexico Corporation (hereinafter Sandia), a defendant below. This dispute concerned certain written agreements of merger and reorganization pursuant to which Sandia transferred to the stockholders and debenture holders of World Wide shares of the common stock of Sandia. Subsequent to the merger of the two corporations, Sandia, the accumulating corporation, did not do well financially as hoped for by the stockholders of World Wide.

Thereafter, the former stockholders of World Wide brought this action on July 31, 1963 against Sandia, its officers and directors, and petitioner "as agent for Sandia American Corporation". While petitioner was a major stockholder of Sandia, at no time was he an officer or director.

The action was brought under the fraud provisions of the Securities and Exchange Act of 1934, as amended, 15 U.S.C.A., Sec. 18(a) et seq., section 10(b) and Rule 10 (b)-5, 17 C.F.R. 240, 10 (b)-5 adopted by the Securities Exchange Commission, and the Securities Act of 1933, as amended, 15 U.S.C.A. Sec. 77(a) et seq.

The gravamen of the action alleges two items of fraud:

(1) An asset of $1,088,000.00 listed by Sandia in its financial statement of December 31, 1961, which related to contractual rights of Sandia to acquire bowling centers by having a nonaffiliated company build bowling alleys for Sandia; and

(2) The purported omission of a liability from the said financial statement of Sandia, payable December 31, 1961, in the amount of $784,000.00 which was due to a third corporation.

In the defendant's Answer and at a preliminary hearing, the defendants below raised, inter alia, the defense of lack of service upon an indispensable party, viz: the corporate defendant, Sandia. By Order dated August 2, 1966, the U. S. District Court for the Eastern District of Pennsylvania granted the plaintiffs additional time to amend the Complaint and to perfect their service on the corporate defendant. The plaintiffs did not remedy the defects in service, and on October 12, 1966 defendants renewed their Motion To Dismiss which the District Court denied on March 27, 1967.

On appeal, the U. S. Court of Appeals for the Third Circuit reversed the judgment of the District Court as to the corporate defendant in an opinion filed March 15, 1971, upon a finding that the corporate defendant was not properly served. However, the Court of Appeals affirmed the Order of the District Court imposing judgment in the sum of $50,000.00 against the individual appellant, the petitioner herein, notwithstanding petitioner's contention that the corporate defendant was an indispensable party to the suit.

*Statement of the Case*

The relief originally sought in the instant action involves the return of stock by Sandia to the stockholders of World Wide and an accounting of the operations of World Wide. The prayer for relief requests:

> "(b) That the contracts of May 14, 1962 and May 18, 1962 be declared void and that Defendant, Sandia, be ordered to transfer back the shares of World Wide and the debentures of World Wide to the shareholders of World Wide in exchange for the shares of Sandia, or that Sandia be ordered to repurchase the shares of Sandia from the former holders of the World Wide stock for the consideration and value agreed upon, to wit, $5.00 per share.
>
> (c) That the Defendants be ordered to file an accounting of the operations of World Wide and the three wholly-owned subsidiaries of World Wide from the date of the acquisition by Sandia to the present date."

Both of these requests for relief were directed at the corporate entity.

The District Court's decision in effect determined that the plaintiffs were obligated to redeliver to defendant, Sandia, the stock of Sandia which it received in the merger transaction; and a special master was appointed to place a value on the World Wide stock at the time of merger, all of which stock had been given by World Wide to Sandia; and that such evaluation (which the master determined to be $50,000.00) was the measure of damages due to the plaintiff.

Therefore, the relief granted by the District Court directed a form of partial recision and partial tort measure of damages which could not possibly be effective without the joinder of Sandia, the corporate defendant. Notwithstanding this, the Court of Appeals affirmed the judgment of the District Court as to petitioner, and in so doing erred in that the corporate defendant was an indispensable party to the action against petitioner.

## REASONS FOR GRANTING THE WRIT

### THE DECISION BELOW, REVERSING THE JUDGMENT OF THE DISTRICT COURT AS TO THE CORPORATE DEFENDANT ONLY ON THE BASIS OF IMPROPER SERVICE, BUT AFFIRMING JUDGMENT AGAINST THE INDIVIDUAL DEFENDANT, RAISES IMPORTANT FEDERAL JURISDICTIONAL AND PROCEDURAL ISSUES WITH RESPECT TO THE RULES RELATING TO INDISPENSABLE PARTIES

The Third Circuit's opinion in this case reflects important federal jurisdictional and procedural issues with respect to indispensable parties in actions brought under the Securities and Exchange Act of 1934, as amended, 15 U.S.C.A. 78(a) et seq., Sec. 10(b) and Rule 10(b)-5, 17 C.F.R. 240.10(b)(5), and The Securities Act of 1933, 15 U.S.C.A., Sec. 77(a) et seq. The Court of Appeals for the Third Circuit has so far departed from the accepted and usual course of judicial proceedings by sanctioning the District Courts' dismissal as to the corporate defendant and permitting the action to proceed as against petitioner only, as to call for an exercise of this Court's power of supervision.

Federal Rule of Civil Procedure 19 (28 U.S.C.) sets forth the guidelines for indispensable parties. Section (b) of this Rule enumerates the factors to be considered by the Court in determining whether a party is

indispensable. If the conclusion is reached that a party is indispensable, the action should be dismissed. The Court of Appeals for the Third Circuit has misconstrued Rule 19 and has thereby not only been unfair to the petitioner but has also set an inappropriate precedent for its application in the Third Circuit.

This Court in *Shields vs. Barrow*, 17 How. 130, 136, 58 U.S. 130, 15 L. Ed. 158 (1854), speaking through Mr. Justice Curtis, defined indispensable parties as:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

According to a 1957 study, *Reed, Compulsory Joinder of Parties in Civil Actions,* 1957, 55 Mich. L. Rev. 327, 340 N. 35, this Court's decision in *Shields vs. Barrow* (supra), has been cited in more than three hundred decisions on the subject of indispensable parties. See also *Barron & Holtzoff, Federal Practice and Procedure,* Rules Edition, Vol. 2, Sec. 512 N. 20 for a list of extensive citations citing the *Barrow* decision.

Thus, the test of indispensability is whether the absent person's interest in the controversy is such that no final judgment or decree can be entered which will do justice between the parties actually before the Court, without injuriously affecting the rights of others not brought into the action. *Chance vs. Buxton* (C.A. 5th 1948), 170 F. 2d 187; *Lawrence vs. Sun Oil Co.* (C.C.A. 5th 1948),

166 F. 2d 466; *Jarvis vs. Schackelton Inhaler Co.* (C.C.A. 6th 1943), 136 F. 2d 116; *Division 525, Order of Railway Conductors of America vs. Gorman* (C.C.A. 8th 1943), 133 F. 2d 273.

Later, in *Niles-Bennent-Pond Co. vs. Iron Moulders Union*, 254 U.S. 77, 41 S. Ct. 39, 69 L. Ed. 145 (1920), this Court stated that:

> "There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not;"

and more recently in *Provident Tradesmens Bank & Trust Co. vs. Patterson*, 390 U.S. 102, 88 S. Ct. 733, 196 L. Ed. 2d 936 (1968):

> "Whether a person is 'indispensable', that is whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of the particular litigation."

This Court stated in *Swan Land & Cattle Co. vs. Frank*, 148 U.S. 603, 13 S. Ct. 699, 37 L. Ed. 577 (1893), that:

> "Stockholders of a corporation cannot be required to represent their corporations" in litigation in which their corporations are not named as defendants where the corporations themselves are indispensable parties to a suit which affects corporate rights or liabilities.

In the instant case, the District Court voided the contract between Sandia and the stockholders of World Wide. Thus, the rights and liabilities of Sandia, which had been dismissed from the action but which was an

indispensable party, were adjudicated solely through the individual defendants. This result was reached notwithstanding the fact that the relief prayed for in the Complaint required corporate action to be taken. Upon the dismissal of the corporation as a defendant, which was a party to the contract sued upon, an indispensable party was absent from the record and the remaining individual defendants could not be compelled to do what only the corporation could do. *Gregory vs. Stetson,* 133 U.S. 579, 10 S. Ct. 422, 33 L. Ed. 792 (1890).

It is clearly settled that, where cancellation, reformation or other equitable relief in respect of a contract or other instrument evidencing a right or claim is sought, all of those having or asserting an interest in the contract or instrument, or who will be affected by the final decree in the suit, are indispensable parties and must be before the Court. *Shields vs. Barrow,* supra; *National Licorice Co. vs. National Labor Relations Board,* 309 U.S. 350, 60 S. Ct. 569, 84 L. Ed. 799 (1940).

The absence of the corporate defendant was so prejudicial to the rights of the petitioner that the District Court should not have permitted the action to continue without Sandia being properly served and again brought upon the record. *Jones Knitting Corp. vs. A. M. Pullen & Co.* (D.C. —N.Y. 1920), 50 F.R.D. 311. The relief sought and the interests of the corporate defendant were so bound up that the presence of the corporate defendant as a party to the proceeding was an absolute necessity. *Baltimore & Ohio R. Co. vs. Chicago River & I. R. Co.* (C.A. Ill. 1948), 170 F. 2d 654, cert. denied 336 U.S. 944, 69 S. Ct. 811, 93 L. Ed. 1101.

It is improper for a Court to order individuals to take action in their corporate capacity where the corporation itself is not before the Court. This is, in effect, taking jurisdiction over the corporation and, therefore, doing by indirection what cannot be done by direction in view of the absence of the corporate defendant as a party. *Kendig vs. Dean,* 97 U.S. 423, 24 L. Ed. 1061 (1878); see also, *Tucker vs. New Orleans Laundries, Inc. et al.,* 90 F. Supp. 290 (1949).

The Fifth Circuit has ruled that in determining indispensability of parties, the relief asked, not the relief granted, is the controlling factor. *Kuchenig vs. California Corp.* (C.A. 5th 1955), 350 F. 2d 551.

The Sixth Circuit has ruled that the failure of a District Court to acquire jurisdiction over indispensable parties to an action deprives the Court of jurisdiction to proceed in the matter and render a judgment. *Schuckman vs. Rubenstein* (C.A. 6th 1947), 164 F. 2d 1952. Similarly, in an action against a corporation and its president for relief under the anti-trust laws, the Sixth Circuit held that the corporation was an indispensable party and the action would not be continued against the individual defendant upon finding that the Court had no jurisdiction over the corporate defendant. *Emery vs. Adams* (C.A. 6th 1950), 179 F. 2d 586.

The Seventh Circuit ruled in *Eads vs. Sayem* (C.A. 7th 1960), 281 F. 2d 791, where, in an action by members of an airline pilot's association against the association's officers to obtain equitable relief from allegedly invalid levies of assessment, that the association itself was an indispensable party.

The Ninth Circuit in the case of *Lewis vs. Lewis* (C.A. 9th 1966), 358 F. 2d 495, which involved a controversy between husband and wife shareholders of a corporation in which the husband sought to examine the corporate books and records without joining the corporation as a party, held that a corporation is an indispensable party where justice cannot be rendered unless the corporate defendant could be compelled to account.

The verdict of the District Court in the instant case was clearly influenced by the presence of the corporate defendant, and the entire trial was conducted under the assumption that the corporate defendant was jointly liable, and for this reason the correctness of the decision below is further subject to serious question. *Washington Gas Light Co. vs. Lansden,* 172 U.S. 534, 19 S. Ct. 296, 43 L. Ed. 543 (1899); *Harrington vs. H. D. Lee Mercantile Co.,* 97 Mont. 40, 33 P. 2d 553 (1934). Sandia American Corporation was by all the proper standards, an indispensable party to the case, and upon its dismissal as a party, the Court below should have also dismissed the action against petitioner. *Emery vs. Adams* (C.A. 6th 1950), 179 F. 2d 586; *Ducker vs. Butler,* 70 App. D.C. 103, 104 F. 2d 236 (1939).

The decision of the Third Circuit in this case is clearly contrary to the decisions of this Court and the cited Circuit Courts, and clearly justifies the grant of certiorari to review the judgment below. The absence of the corporate defendant constitutes a fatal defect requiring dismissal of this action, since the requested relief cannot be effective without its joinder.

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,
PACE REICH
JERRY ZASLOW
*Counsel for Petitioner*

1500 Land Title Building
Broad and Chestnut Streets
Philadelphia, Pennsylvania 19110
Date:

IN THE
SUPREME COURT OF THE UNITED STATES

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**Term, 1971**
**No.**

NATHAN WECHSLER,

*Petitioner*

vs.

IRVING GOTTLIEB et al.,

*Respondents*

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CERTIFICATE OF SERVICE

---

I hereby certify that on this day of July, 1971, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to William R. Pomerantz, Esquire, Suite 913, 1420 Walnut Street, Philadelphia, Pennsylvania 19102, Counsel for the Respondent. I further certify that all parties required to be served have been served.

JERRY ZASLOW
*Counsel for Petitioner.*

1500 Land Title Building
Broad and Chestnut Streets
Philadelphia, Pennsylvania 19110

*Appearance*

SUPREME COURT OF THE UNITED STATES

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NATHAN WECHSLER,

*Petitioner*

vs.

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*Respondents*

---

The Clerk will enter my appearance as counsel for the Petitioner.

PACE REICH
1500 Land Title Building
Broad and Chestnut Streets
Philadelphia
Pennsylvania 19110

The Clerk is requested to notify counsel of action of the Court by means of regular mail.

In this case the person to be notified for Petitioner is Pace Reich, Esquire, 1500 Land Title Building, Broad and Chestnut Streets, Philadelphia, Pennsylvania 19110.

*Notice*

SUPREME COURT OF THE UNITED STATES

**Term, 1971**
**No.**

NATHAN WECHSLER,

*Petitioner*

vs.

IRVING GOTTLIEB,

*Respondent*

*To: William R. Pomerantz, Esquire, Counsel for Respondent:*

You are hereby notified that a Petition for a Writ of Certiorari in the above entitled and numbered case was docketed in the Supreme Court of the United States on the day of , 1971.

PACE REICH, ESQUIRE
*Counsel for Petitioner*
1500 Land Title Building
Broad and Chestnut Streets
Philadelphia
Pennsylvania 19110

## APPENDIX

UNITED STATES COURT OF APPEALS
*For the Third Circuit*

Nos. 18,400, 18,530, 18,956 and 18,957

Irving Gottlieb et al.

v.

Sandia American Corp., etc. et al.
Sandia American Corporation,
Appellant in 18,400
Nathan Wechsler, etc.,
Appellant in 18,530
Sandia American Corporation,
Appellant in 18,956
Nathan Wechsler,
Appellant in 18,957

(D.C. Civil Action No. 33924)

Appeal From the United States District Court
for the Eastern District of Pennsylvania

Argued January 26, 1971
Before Hastie, Chief Judge, and Aldisert and
Gibbons, Circuit Judges

## OPINION OF THE COURT
(Filed March 15, 1971)

Aldisert, Circuit Judge.

The corporate and individual appellants challenge the civil judgment of the district court, sitting without a jury, awarding damages for violations of Rule 10(b) (5), 17 C.F.R. §240.10b-5 and the Securities Exchange Act, 15 U.S.C. §78 j(b). They contend that the complaint against Sandia American Corporation should have been dismissed for want of *in personam* jurisdiction, and that the lower court erred both in finding a violation of the regulation or statute and in calculating the resultant damages.

The United States Marshal served copies of the summons and complaint upon the individual defendant, but made a return of "not found" as to the corporation.[1] An answer filed in behalf of all defendants set forth the defense of lack of service as to the corporation. At a hearing

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[1] The returns of the marshal as to appellant Nathan Wechsler and the corporate defendant, Sandia American:

I hereby certify and return that I served the annexed Summons-Complaint (Writ) on the therein-named Nathan Wechsler (Individual, company, corporation, etc.) by handing to and leaving a true and correct copy thereof with him (Individual or agent of company, corporation, etc.) personally at 1420 K. St—NW (Address—Street number, apartment number, rural route, etc.) at Washington (City), D.C. (State) in the said District at 1:00 p.m. on the 12 day of Aug. 1963.

Luke C. Moore
*United States Marshal.*
By (s) William H. Becker
*Deputy.*

on this issue, the court ordered additional time in which to perfect service on the corporate defendant, but the plaintiffs did not attempt a second service. Instead they rested on the contention that service on the individual defendant, Nathan Wechsler, also constituted valid service on the corporation. They emphasized that although Wechsler was not an officer or director of the corporation, he was a controlling stockholder, and that the written agreement covering the transactions which generated the present litigation listed Wechsler's office address as the place to which notices to the corporation should be sent:

> Notices. All notices, requests, demands and other communications hereunder shall be in writing, and shall be deemed to have been duly given if delivered or mailed, . . . to the purchaser [Sandia American] at 1420 K St., N.W., Washington, 5, D.C.

At a second hearing on the motion to dismiss for insufficient service, the district court ruled that there had been valid service upon the corporation. It reasoned that

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I hereby certify and return annexed Summons-Complaint (Writ) on the therein-named Sandia American Corp. (Individual, company, corporation, etc.) not to be found in my district—no agt or office at 1420 K. St—NW (Individual or agent of company, corporation, etc.) to serve at 1420 K. St—NW (Address—Street number, apartment number, rural route, etc.) at Washington (City), D.C. (State) in the said District at 3:00 p.m., on the 6 day of Sept. 1963.

Luke C. Moore
*United States Marshal.*
By (s) William H. Becker
*Deputy.*

service on Wechsler amounted to service on the corporation because (a) Wechsler had been the "negotiating agent for the defendant corporation" in the business transaction, (b) his address was the same as that specified in the agreement for sending notices to the corporation; and (c) "there were sufficient contacts on the part of the parties to this transaction to confer jurisdiction on this Court."

We disagree with this analysis and result. It is necessary to emphasize that the issue here is not one of constitutional due process, but one of compliance with the Federal Rules of Civil Procedure. Therefore, the question of "sufficient contacts" is simply not relevant. For the corporate service to be valid, it must qualify in theory and in fact under Rule 4(d)(3):

> Service shall be made as follows:
>
> Upon a domestic corporation . . . by delivery of a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . .

Because Wechsler was not an officer or an agent authorized by appointment or by law to receive service of process, the plaintiffs had the burden of proving that his position was that of "managing or general agent."[2]

---

[2] Wirtz v. Mercantile Stores Co., 271 F. Supp. 830 (E.D. Okla. 1967); Dominguez v. National Airlines, Inc., 42 F.R.D. 35 (S.D. N.Y. 1966). See Smeltzer v. Deere & Co., 252 F. Supp. 552 (W.D. Pa. 1966); Rutter v. Louis Dreyfus Corp., 181 F. Supp. 531 (E.D. Pa. 1960).

The determination whether an individual is "a managing or general agent" depends on a factual analysis of that person's authority within the organization. 2 Moore's Federal Practice ¶4.22[2]. One occupying this position typically will perform duties which are "sufficiently necessary" to the corporation's operations. Goldberg v. Mutual Readers League, Inc., 195 F. Supp. 778, 783 (E.D. Pa. 1961). He should be "a responsible party in charge of any substantial phase" of the corporation's activity, Remington Rand, Inc. v. Knapp-Monarch Co., 139 F. Supp. 613, 631 (E.D. Pa. 1956); Lone Star Package Car Co. v. Baltimore & Ohio R. R., 212 F. 2d 147, 152 (5 Cir. 1954). In brief, it is reasonable to expect that such an agent will have broad executive responsibilities and that his relationship will reflect a degree of continuity. See Aquacutum of London, Inc. v. S. S. American Champion, 426 F. 2d 205 (2 Cir. 1970); see also Young v. Albert Pick Hotels, 375 F. 2d 331 (D.C. Cir. 1967). Authority to act as agent sporadically or in a single transaction ordinarily does not satisfy this provision of the Rule. Zhemeck v. J. H. Winchester & Co., 23 F.R.D. 8 (E.D. Pa. 1958). Holland v. Parry Navigation Co., 7 F.R.D. 471 (E.D. Pa. 1947).

The district court characterized Wechsler as a "transactional agent" instead of the "managing or general agent," and our independent examination of the record does not persuade us that Wechsler was shown to occupy the status designated by Rule 4(d)(3). Indeed, plaintiffs offered no testimony to support the validity of the service. Thus, the record before us is limited to the pleadings which constituted the sole record before the district court

at the time the issue was decided.[3] Those pleadings show that the agreement between the parties was signed by the president and the secretary of Sandia American and not by Wechsler. The complaint did not aver that Wechsler was a managing or general agent, but simply "an agent for Sandia and authorized by Sandia to negotiate the acquisition of World Wide." The defendants' answer denied that Wechsler "was anything but tax counsel in negotiating the exchange of the stock."

The transfiguration of service on Wechsler into a valid service on the corporation is made even more difficult by the facts reported on the marshal's return. Wechsler was not served as an agent of the corporation, but as an individual defendant.[4] Moreover, the summons and complaint to be served on the corporation were returned "not found" by the marshal, even though an attempt to find an officer or agent was made at Wechsler's office. What the marshal reports as "not found," no court may, without evidentiary or legal support, "find."[5]

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[3] The service was held valid by a different member of the court than the judge who presided at trial.

[4] Significantly, plaintiffs have not challenged the integrity of the marshal's return on the theory that the marshal failed to follow directions to serve the corporation through its putative managing or general agent, Wechsler. Rather, they rely on the concept that service on Wechsler as an individual was also service on the corporation because he was, in fact, the corporate agent who negotiated their transaction.

[5] See Rutter v. Louis Dreyfus Corp., supra, note 2: although a marshal's return is not conclusive on the question of service on an agent, it will stand in the absence of proof to the contrary. 181 F. Supp. at 533.

A duly organized business corporation enjoys an identity separate and apart from its stockholders, directors, and officers. Kauffman v. Dreyfus Fund, Inc., 434 F. 2d 727 (3d Cir. 1970). The law's recognition of this separate identity is the very concept which has stimulated and encouraged the development and proliferation of corporations in the business community. Historically, a corporaiton was held incapable of legal "existence" outside the state whose laws chartered it. The modern view is that a corporation "exists" anywhere it is doing business and that it may there be amendable to valid service.[6] But to say that a corporation may be served wherever it is doing business is not to conclude that service on any corporate personnel is of itself valid service on the corporation. The applicable Federal Rule provides that valid corporate service can be effected only if certain designated personnel are served, viz, an officer or qualified agent thereof.

Moreover, the Rules distinguish between service of one in his individual capacity, Rule 4(d)(1), and service of one as a representative of a corporation 4(d)(3). An individual may be served "personally or by leaving copies [of the summons and complaint] at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." But there is no provision under Rule 4(d)(3) for substituted service on the

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[6] Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

corporation's representative. Copies of the summons and complaint must be delivered to the officer or agent.[7]

To prove valid service, it was incumbent upon plaintiffs to show that Wechsler was a managing or general agent for the corporation and that he was served in a representative rather than individual capacity. They have failed on both counts in carrying their burden of proof. It appearing that the corporate appellant was not properly served, that it did not submit to the court's jurisdiction by an affirmative act of submission or by conduct, Fed. R. Civ. Pro. 12(h), and that it timely asserted a challenge to jurisdiction of the court over its person first by answer and then by motion under Fed. R. Civ. Pro. 12(b), we hold that the complaint against it should have been dismissed.

The correctness of the judgment against the individual appellant turns on the validity of the district court's finding of a violation of Section (b) of Rule 10(b)(5), 17 C.F.R. §240.10b-5:

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[7] Service under this part of the rule cannot be made, as it may be made on individuals pursuant to Rule 4(d)(1), by leaving a copy of the summons and complaint at the officer's or agent's dwelling house or usual place of abode with a person residing therein. And, generally speaking, the process cannot be left with someone at the officer's or agent's office.

4 Wright & Miller, Federal Practice and Procedure, Civil, §1101 at 384 (1969).

See Tyson v. Publishers Co., 223 F. Supp. 114, 115 (E.D. Pa. 1963); Bard v. Bemidji Bottle Gas Co., 23 F.R.D. 299, 302 (D. Minn. 1958); In re Eizen Furs, Inc., 10 F.R.D. 137 (E.D. Pa. 1950).

> It shall be unlawful for any person . . . (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. . . .

The court found a misstatement or omission of material fact in a December 31, 1961, consolidated financial statement of Sandia American Corporation. The corporation, principally through Wechsler, acquired assets of World Wide Corporation in exchange for Sandia American stock. Plaintiff-appellees, formerly stock and debenture holders of World Wide, alleged that Sandia American's execution of $784,000 in promissory notes to a third corporation was not reflected in the financial statement or otherwise communicated to them prior to consummation of the agreement, and that there was, therefore, a misrepresentation of the true value of the Sandia American's stock at the time they agreed to take it in exchange for their World Wide holdings.

The defense responded that this particular obligation was not Sandia American's, but that of subsidiary corporations. The short answer to this is that the December 31, 1961, statement purported to be a consolidated financial statement of the subsidiary as well as parent corporations.[8] Because the combined assets were listed, it fol-

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[8] Sandia American had entered into contractual obligations to purchase bowling centers from the third corporation on February 18 and March 15, 1961, wherein it obligated itself to substantial financial commitments. The agreement provided that Sandia American could set up subsidiaries which could execute promissory notes and that in case of default, the selling corpo-

lows that combined liabilities should also have been disclosed.

The second prong of the defense argument is that there was no showing by plaintiffs that they relied on the financial statement. We find a sufficient nexus between the misstatement and the purchase to meet the statutory test of the Securities and Exchange Act, 15 U.S.C. §78 (b):

> It shall be unlawful for any person . . . (b) to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[9]

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ration would "hold Sandia harmless" and look only to the assets of the designated subsidiary. Sandia American set up a subsidiary in 1961 under the name Star Associates to purchase leaseholds for other subsidiaries of Sandia American and to assume obligations thereunder. As of December 31, 1961, the selling corporation had not accepted Star Associates on the notes executed pursuant to the February and March agreements, nor had it released Sandia American from liability under the agreements.

[9] Rule 10(b)(5), 17 C.F.R. §240.10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

The test is satisfied "whenever a device was employed 'of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities. SEC v. Texas Gulf Sulphur Co. [401 F. 2d 833, 860 (2 Cir. 1968)].'" Heit v. Weitzen, 402 F. 2d 909, 913 (2 Cir. 1968). See City National Bank v. Vanderboom, 422 F. 2d 221, 229 (8 Cir. 1970); SEC v. North American Research & Development Corp., 424 F. 2d 63, 82 (2 Cir. 1970); Royal Air Properties, Inc. v. Smith, 312 F. 2d 210, 212 (9 Cir. 1962).

Moreover, liability is not limited to the corporation but extends also to any person associated with the corporation who withholds material information concerning the value of the corporation's stock. 15 U.S.C. §78(b); 17 C.F.R. §240.10b-5. Appellant Wechsler was the negotiating agent for Sandia American in the transaction with the plaintiffs. He was the senior partner of the accounting firm which prepared the consolidated financial statement of Sandia American and subsidiary companies, the controlling stockholder of the parent corporation, and a partner in Star Associates, the operating company for Sandia American's subsidiaries. His actions clearly came within the pale of the regulation and the statute.

Both parties to this appeal object to the award of $50,000.00 damages. Because appellees did not lodge a cross-appeal, their argument as to insufficiency will not

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(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

be considered. We have concluded that the district court gave full and proper consideration to the damage issue. Recognizing the complexity of this issue, the court appointed a special master who fashioned a formula of compensation. Although the question of proper damages is not free from difficulties, we believe that the court did not err. See J. I. Case Co. v. Borak, 377 U.S. 426 (1964).

The judgment against Sandia American Corporation will be reversed and the complaint against it dismissed. The judgment against the individual appellant will be affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

ORDER DATED 3/24/67, HIGGINBOTHAM, J.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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No. 33924 Civil Action

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Irving Gottlieb et al.

vs.

Sandia American Corporation et al.

---

ORDER

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And now, this 24th day of March, 1967, the motion to dismiss filed by the defendant, Sandia American Corporation, is denied. The plaintiffs have alleged that Nathan Wechsler (who has been served in this action) was the negotiating agent for the defendant corporation and service as to him is service on the corporation. The defendant does not deny this allegation.

In addition the contract in the dispute between the parties to this litigation contains the following clause:

Notices. All notices, requests, demands and other communications hereunder shall be in writing,

and shall be deemed to have been duly given it delivered or mailed, first class postage prepaid, if to either the Seller at 303 Lorimer Drive, Wyncote, Pennsylvania, or at such other address as he may have furnished to the Purchaser in writing, or if to the Purchaser, at 1420 K Street, N.W., Washington 5, D.C.

The address at which the defendant, Nathan Wechsler, was served is the same one as that specified in the contract for receipt of communications. I therefore find that the defendant corporation had notice of this suit and that service on Nathan Wechsler is constituted service on it.

I conclude also that there were sufficient contacts on the part of the parties to this transaction to confer jurisdiction on this Court.

By the Court:
A. Leon Higginbotham, Jr.
*J.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 33924

Irving Gottlieb

vs.

Sandia American Corporation et al.

ORDER

Defendants' motion to dismiss is denied without prejudice; plaintiff is granted sixty days to amend the complaint and to initiate and finish discovery pertaining to problems on the service of process and the identification of the proper parties and venue for service. Within sixty days plaintiff may make service of the amended complaint as in any manner sanctioned by the applicable statutes and Federal Rules of Civil Procedure. If plaintiff fails to properly amend its complaint or to have effective service, defendants may renew their motion to dismiss.

By the Court:

A. Leon Higginbotham, Jr.

*J.*

Dated: August 2, 1966.

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In The

# Supreme Court of the United States

Term, 1971

No. 71–61

NATHAN WECHSLER,

*Petitioner,*

*vs.*

IRVING GOTTLIEB et al.,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM R. POMERANTZ
1412 Fox Building
1612 Market Street
Philadelphia, Pennsylvania 19102

NEWMYER & NEWMYER
Suite 520, Farragut Building
900 – 17th Street, N. W.
Washington, D. C. 20002

*Counsel for Respondents*

(4828) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 565-6377 Philadelphia, Pa. (215) 563-5587

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IN THE SUPREME COURT OF THE UNITED STATES

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Term, 1971, No. 71-61

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NATHAN WEGHSLER,

*Petitioner,*

*vs.*

IRVING GOTTLIEB et al.,

*Respondents.*

- - - - - - - - - - - - - - - - -x

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## Counterstatement of the Question

Where the United States Court of Appeals reversed the judgment of the District Court as to a corporate defendant finding that the corporate defendant was not properly served but affirmed the District Court's judgment against an individual defendant in an action brought under the fraud provisions of the Federal Securities Law, is the judgment against the individual defendant a valid one?

## Counterstatement of the Case

Respondents were owners of securities of World Wide Bowling Enterprises, Inc., a Delaware corporation (hereinafter referred to as "World Wide"). The action was brought under the fraud provisions of the Securities and Exchange Act of 1934, as amended, 15 U.S.C.A., Sec. 18(a) et seq., Section 10(b) and Rule 10(b)-5, 17 C.F.R. 240, 10(b)-5 adopted by the Securities Exchange Commission, and the Securities Act of 1933, as amended, 15 U.S.C.A. Sec. 77(a) et seq.

The action arose when the stockholders and debenture holders agreed to sell their World Wide stock to Sandia American Corporation (hereinafter referred to as "Sandia"), one of the defendants below, the purchase price being shares of Sandia which thereby acquired all of the assets of World Wide. Petitioner, Nathan Wechsler, who was a practicing attorney and certified public accountant in the District of Columbia was also the negotiating agent and the controlling stockholder of Sandia, acted as both counsel and accountant for Sandia and who, in general, was the moving force behind the transaction.

The other named defendants below were officers and directors of Sandia. The acts complained of created a pattern of both general and specific acts of omission and commission on the part of Sandia, petitioner, Nathan Wechsler being the moving party. One of the specific acts alluded to by the District Court and the United States Court of Appeals concerns Sandia's execution of $784,000 in promissory notes to a third corporation which was not reflected in the Sandia Finan-

cial Statement or otherwise communicated to respondents prior to consummation of the agreement, and that there was, therefore, a misrepresentation of the true value of the Sandia stock at the time they agreed to take it in exchange for their World Wide holdings. By order dated April 14, 1970, the District Court sustained a report by a Special Master which awarded to respondents $50,000 plus 6% interest annually. On appeal, the United States Court of Appeals for the Third Circuit reversed the judgment of the District Court as to the corporate defendant in an opinion filed March 15, 1971 finding that the corporate defendant was not properly served but affirmed the District's Court's judgment against Nathan Wechsler, the individual appellant, the petitioner herein.

It is the petitioner's position that the corporate defendant was an indispensable party to the suit and that the judgment against him should not stand. The respondent's position that liability is not limited to the corporation but extends also to any person associated with the corporation who withholds material information, in this case concerning the value of Sandia's stock.

## Reasons for Denying the Writ

LIABILITY IS NOT LIMITED TO THE CORPORATION (SANDIA) BUT EXTENDS ALSO TO ANY PERSON (PETITIONER) ASSOCIATED WITH THE CORPORATION WHO WITHHOLDS MATERIAL INFORMATION CONCERNING THE VALUE OF THE CORPORATION'S STOCK.

The lower court held that there was a failure on the part of the officers and directors of

Sandia to disclose material facts relating to Sandia's financial statements, to the general financial condition of Sandia, its subsidiaries and its owners, to the details of the contractual arrangements with a third corporation for the purchase and operation of bowling centers, to the uncertainty and remoteness of profit to Sandia under such arrangements, and to the other potential liabilities to Sandia or its subsidiaries arising from the contract; and the failure of the defendants to make the World Wide share and debenture-holders aware of these facts prior to the consummation of the acquisition of World Wide by Sandia constituted violation of Rule 10(b)-5 for which the defendants (of which petitioner was one) may be held liable for damages. The court cited: Kardon v. National Gypsum Co., 73 F. Supp. 798 (E.D. Pa. 1947); Royal Air Properties, Inc. v. Smith, 312 F.2d 210 (9th Cir. 1962); Heit v. Weitzen, 402 F.2d 909 (2nd Cir. 1968); Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967), cert. denied 390 U.S. 951 (1968); Stevens v. Vowell, 343 F.2d 374 (10th Cir. 1965); Mader v. Armel, 402 F.2d 158 (6th Cir. 1968). The District Court also referred to Bromberg, Securities Laws: Fraud — SEC RULE 10b-5, Section 4, 2, p. 69 (1969) and cases therein cited.

The United States Court of Appeals in this case irrefutably held that the correctness of the judgment against the individual appellant (petitioner) turns on the validity of the District Court's finding of the violation of Section (b) of Rule 10(b)(5), 17 C.F.R. Sec. 240, 10b-5:

"It shall be unlawful for any person...

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading...."

The court below in its opinion filed March 15, 1971, Circuit Judge Aldisert stated:

> "The Court found a misstatement or omission of material fact in a December 31, 1961, consolidated financial statement of Sandia American Corporation. The Corporation, princpally through Wechsler, acquired assets of World Wide Corporation in exchange for Sandia American stock. Plaintiff-appellees, formerly stock and debenture holders of World Wide, alleged that Sandia American's execution of $784,000 in promissory notes to a third corporation was not reflected in the financial statement or otherwise communicated to them prior to consummation of the agreement, and that there was, therefore, a misrepresentation of the true value of the Sandia American's stock at the time they agreed to take it in exchange for their World Wide holdings" (p. 28, Appendix — Opinion). (Underlining added.)

The United States Court of Appeals in upholding the violation by the appellants below stated "the test is satisfied 'whenever a device was employed of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a cor-

poration's securities. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 860 (2 Cir. 1968)'" (p. 30, Appendix-Opinion). That court also cited: Heit v. Weitzen, supra; City National Bank v. Vanderboom, 422 F.2d 221, 229 (8 Cir. 1970); SEC v. North American Research and Development Corp., 424 F.2d 63, 82 (2 Cir. 1970); Royal Air Properties, Inc. v. Smith, supra.

Judge Aldisert's opinion then, simply and succinctly held that liability is not limited to the corporation but extends to any person associated with the corporation who withholds material information concerning the value of the corporation's stock. 15 U.S.C. Sec. 78(b); 17 C.F.R. Sec. 240, 10b-5.[1] Quoting directly from the opinion:

> "Appellant Wechsler was the negotiating agent for Sandia American in the transaction with plaintiffs. He was the senior partner of the accounting firm which prepared the consolidated financial statement of Sandia

1. Rule 10(b)(5), 17 C.F.R. §240.10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud.
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

> American and subsidiary companies, the controlling stockholder of the parent corporation, and a partner in Star Associates, the operating company for Sandia American's subsidiaries. His actions clearly came within the pale of the regulation and the statute" (p. 30, Appendix-Opinion).

In the light of Judge Aldisert's specific holding that petitioner is liable, in personam, it is difficult to comprehend petitioner's contention that the verdict below cannot stand. To preclude liability on the ground that the corporation was an indispensible party runs counter to the spirit, the rationale and the simple language of the regulation and the statute each of which aims its protective thrust against individuals associated with a corporation who withhold material information concerning the value of the corporation's stock. Both the District Court and the United States Court of Appeals name this petitioner as one who in this case knowingly withheld material information from respondents concerning the value of Sandia's stock.

The decision of the Third Circuit in this case is clearly in line with the decisions of this Court and the cited Circuit Courts which hold corporate insiders personally liable for their misleading acts of omission and commission; in the giving of misleading information and the withholding of pertinent information concerning the value of the corporate stock. The cases cited by the petitioner are not mundane to the subject matter of this case.

## Conclusion

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

s/ Alvin L. Newmyer, Jr.
NEWMYER & NEWMYER
Suite 520, Farragut Bldg.
900-17th Street, N.W.
Washington, D.C. 20002

William R. Pomerantz
1412 Fox Building
1612 Market Street
Phila., Pa., 19103

*Counsel for Respondents*